Supreme Court, U.S.
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NO. 93-642

LOIS A. FISHER

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER LOIS FISHER

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I. IN ITS BRIEF IN OPPOSITION, RESPONDENT HAS INTENTIONALLY DISTORTED THE RECORD TO PLACE PETITIONER IN A POOR LIGHT. IN DOING SO, RESPONDENT HAS DEMONSTRATED WHY SUMMARY JUDGMENT WAS INAPPROPRIATE.

Throughout its Brief in opposition to the Petition, Respondent has set forth false statements and false innuendos designed to place the Petitioner in a poor light and to distract this Court's attention from the significant, underlying legal issues. In doing so, Respondent has followed a consistent pattern, first begun before the district court and continued before the Court of Appeals. Largely as a result of this tactic, Petitioner has yet to have a plenary hearing in any forum.

Respondent characterizes Petitioner's legal argument as asserting that there is "necessarily an equivalency between evidence of a *prima facie* case and evidence of pretext." Respondent's Brief

at p.21. This is not the case. Rather, Petitioner has pointed out the need for this Court to clarify the following points: (1) that the standard for summary judgment after St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S. Ct. 2742 (1993) is no different from that required by Rule 56; (2) that summary judgment for the defendant should *rarely* be granted once a *prima facie* case has been established; and (3) that, for the purpose of resisting a motion for summary judgment, evidence in support of the qualifications prong of the *prima facie* test and evidence of pretext may be identical.

The Respondent now argues that courts court should refrain from substituting their judgment for that of an academic institution when determining questions of appointment, renewal, promotion, and

tenure.[1] But the issue at this stage of the proceeding is not whether the reasons proffered by the institution are adequate; the issue is whether the reasons are true or merely a pretext for discrimination.[2] On the record here, and on the record in many similar cases in which evidence in support of pretext and in support of a *prima facie* case are presented together, a resolution of factual disputes on a summary judgment motion is improper.

In its Summary of Argument, Respondent asserts the following:

> If, after a defendant articulates legitimate, non-discriminatory reasons for a challenged employment action, the plaintiff does not produce evidence from which a fact-finder may

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[1] However, Respondent's counsel repeatedly substitutes his judgment for that of the University. See, pp. 6-15, infra.

[2] As pointed out in the Petition, reappointment was not a contest. Each applicant was to be judged by the stated criteria, and all could be reappointed.

> reasonably infer pretext, summary judgment should be granted to the defendant.

Respondent's Brief at p.18. However, a judge determining a motion for summary judgment is not a fact-finder, and this Court has recognized the possibility that a defendant will articulate so-called legitimate reasons that are, in reality, disingenuous.

Section IV of Justice Scalia's opinion in Hicks discusses extensively the consequences of an employer proffering false reasons, and it concludes, in part, that false testimony may entitle the defendant to a trial. But, of even greater importance, false testimony by a defendant should not deprive a plaintiff of a trial, once that plaintiff has proved a *prima facie* case.

Put differently, Justice Scalia's opinion took pains to allay fears that

false testimony by an employer would be rewarded. But unless the issue raised by the Petitioner is clarified, arguments such as that advanced by the Respondent will prevail, and Hicks will have produced exactly the result which Justice Scalia sought to eliminate.

The problem, of course, is that the district court repeatedly resolved credibility disputes and contested issues of material fact, in violation of Rule 56's well established standards, and it did so largely on the basis of self-serving Affidavits submitted by Rutgers' officials, often after the same officials had been deposed. Nothing demonstrates more clearly the inappropriateness of summary judgment in this case than the clear divergence between the facts set forth by the Petitioner and those set forth by the Respondent. Fortunately, it

is sometimes possible to anchor these various contentions in reality, and, when that occurs, Respondent's overall design is apparent.

Some of the more glaring examples are the following:

- At page 12 of Respondent's Brief, it is asserted that Dean Hosford recalled that Petitioner had complained about the quality of her students, citing Pa102, the district court's decision. A review of the Appendix and of the decision reveals no such reference.

- Similarly, at page 6 of its brief, Respondent cites Pa30, the district court's decision, to state that Petitioner had "ever-changing and conflicting research goals with meager results." The district court said no such thing in the entire opinion.

- Contrary to Respondent's

assertions at pages 3-5, Petitioner was well qualified for her position. Dean Kaish's recommendation regarding Petitioner's hiring, as reflected in his extensive statement in the record, was not at all ambivalent. It strongly endorsed Petitioner's qualifications, including her background in organizational behavior, as appropriate to a business program and cited the positive recommendations of others and the approval of her hiring by David Blake, Dean of the Graduate School of Management.

- At page 4 of its Brief, Respondent characterizes Petitioner's post-doctoral studies at New York University as a "course." In fact, it was a business curriculum.

- At page 4 of its Brief, Respondent falsely states that Petitioner "suggests" that her post-doctoral studies at N.Y.U.

were in her doctoral field. She asserted the opposite. Petition at page 6.

○ At page 4 and footnote 4 of its Brief, Respondent (and Dean Hosford) also ignore documents submitted at the time of Petitioner's application that showed that she had two major doctoral fields: higher education and social and organizational psychology, and that her research dealt with the management of institutions of higher education. Petitioner's resume showed that she had extensive experience in these fields.

○ Salary data demonstrated that Petitioner's starting salary was lower than any other newly hired faculty member on tenure track in 1985 in all business units on any campus at Rutgers, including those without Ph.D.'s, and lower than any tenure track faculty hired in 1985 at the Faculty of Arts and Sciences--Newark.

○ Respondent's Brief relies upon Petitioner's 1985 and 1986 performance reviews. These were not submitted by Petitioner as part of her reappointment packet, were not considered by the department committee, and, under the Rules established by Rutgers, could not have been considered.

○ At page 7, Respondent quotes from then Department Chair Rosenberg's 1986 performance review, stating: "As she [Fisher] shifts her emphasis more into Mgt. Studies, her goals should become more focused in business areas." However, Respondent intentionally omitted the preceding sentence of that review, which stated "Her goals are realistic and most have been met ore are in progress . . ." and the final sentence, which stated "Her energy level and commitment are impressive."

○ At page 10 of its brief, Respondent criticizes Petitioner for having only one published refereed article. She had two published articles (and an abstract published in the Academy of Management Proceedings). Respondent ignores Petitioner's notification of the publication of her second article in her reappointment packet. Petitioner fails to mention that some successful candidates had none.

○ Also at pages 6 and 13-14, in an effort to minimize Petitioner's post-hire research, Respondent refers to an article which it asserts was accepted for publication before Petitioner was hired and published in 1985. Both facts are wrong. The article was accepted after Petitioner was hired and had begun her appointment and, after revisions, was published in the 1985 volume in March of

1986, while Petitioner was teaching at Rutgers.

○ Respondent repeatedly asserts that Petitioner's research was not in the field of management; it was.

○ While minimizing the value of Petitioner's pre-hire research, Respondent, at page 15, cites Professor Castelino's pre-hire research as a point in his favor. Castelino, a younger male, received his Ph.D. three years before Petitioner and had held a four year prior appointment as assistant professor of finance.

○ Contrary to the impression which Respondent hopes to create, there was no University standard which required that Petitioner publish in management journals for reappointment, even though she did so.

○ At pages 10 and 11, Respondent has taken Petitioner's comments on her

publications out of context. Petitioner never said that the journal in which she published was not management oriented. Respondent quotes out of context from Petitioner's Research Statement in her packet. In fact, Petitioner was also pursuing management research in other areas, such as collective bargaining, but completion of this research and its publication was not required for reappointment.

○ Respondent's assertion that Petitioner was not reappointed because her research accomplishments were "clearly below average" in both quantity and quality is clearly pretext. During 1987 and 1988, both FASN and the Graduate School of Management reappointed some assistant professors who had no publications whatsoever. A detailed list of those reappointed with fewer

publications, or with none, was ignored by the district court.

○ While a University may be legitimately concerned about recruitment, this is not among the five criteria set forth for reappointment in the Respondent's Promotion Instructions.

○ Despite Respondent's contention at page 15, footnote 12 that identical procedures were followed with respect to Petitioner and Castelino, they were not. The Dean failed to complete the required rating form for Castelino and for the other successful candidates. He did so only for Petitioner and for the only other non-reappointed candidate, who was also an older woman.

○ Even if the same procedures were followed for Petitioner and Castelino, they had a different impact. Professor Blake, the tenured faculty member who was

not notified to attend the department committee meeting, was the only person available in Petitioner's field. In contrast, the then department chair, who had directly helped Castelino with his work, was present and, contrary to the Promotion Instructions, voted with the department.

- Respondent repeatedly points out that Castelino had articles on review. This is no assurance of their publication or of their quality. In fact, Respondent made no assessment of the quality of Castelino's work. Yet it claimed that Petitioner's work was of poor quality with no evidence and ignored evidence to the contrary.

- Respondent's statement, in footnote 14, that Research Council Grants for new faculty are "commonly granted" is false and contradicted by the record.

These grants were competitive among all new faculty and were not "commonly granted."

○ Contrary to the impression that Respondent creates in footnote 14, Petitioner did receive a second Research Council Grant. Her second grant was competitive among all University faculty. Castelino did not receive this grant.

○ Although Respondent refers to Castelino's works in progress, submission of such works was not required by the promotion instructions and was not requested by department chair Venezian.

○ Respondent has ignored completely the statistical report of Dr. Ashenfelter, which shows that Respondent had a clear bias towards younger male candidates that was generally statistically significant.

There is nothing about the nature of a discrimination case which mandates or even

suggests that evidence of a *prima facie* case and evidence of pretext must be separate and distinct from each other. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-255. Here, as in other cases of employment discrimination "[t]he issue of the defendant's intent at the time of the plaintiff's discharge is clearly a factual question." Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987).

The Hicks analysis leaves in doubt the nature and extent of analysis of evidence to be conducted by a Court on a motion for summary judgment. Because this is an ambiguous issue, and because the instant case is so drastically affected by the nature of the analysis, the Petition should be granted.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the initial petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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